IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1216

BRITISH AIRWAYS BOARD,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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This Brief is submitted in reply to the Brief of Boeing in Opposition pursuant to Supreme Court Rule 24(4).

The courts below have made findings as to the ultimate facts in issue in this case, thus exceeding their function under Rule 56 of the Federal Rules of Civil Procedure and wrongfully depriving petitioner of its right to a trial. Further, petitioner has been denied the opportunity to develop through discovery processes provided for in the Federal Rules of Civil Procedure evidence to rebut Boeing's theory of the cause of the accident, a theory completely accepted by the courts below. Clearly Boeing is wrong when it contends that these are not issues deserving the Court's attention!

This misapplication of Rule 56 of the Federal Rules of Civil Procedure certainly warrants action by this Court.

Boeing states in Point I of its Brief that "[t]he legal standards applicable to a motion for summary judgment cannot be seriously questioned." In this regard Boeing is entirely correct and the improper application of those standards by the courts below requires action by the Court.

It is difficult to imagine a case in which summary judgment is more inappropriate than this products liability action. First, the courts have consistently expressed serious reservations regarding the appropriateness of granting summary judgment in negligence cases, especially where the issue of causation is in dispute. *Arney* v. *United States,* 479 F.2d 653 (9th Cir. 1973). The issue of causation was at the very heart of Boeing's motion for summary judgment. Boeing contended that the accident was due to abnormally severe turbulence which exceeded the design limits of the aircraft. British Airways, on the other hand, argued that the accident was caused by design and manufacturing defects which caused the tail of the aircraft to separate in flight. Thus, the issue of causation was in sharp and substantial dispute.

Nevertheless, the district court, affirmed by the Court of Appeals, proceeded to decide the disputed fact issues relating to causation. The district court granted summary judgment dismissing petitioner's complaint after *weighing* the conflicting theories and evidence presented as to the cause of the accident, accepting Boeing's theory of the accident and *finding* that the "probable cause of the accident in question was abnormally severe Clear Air Turbulence." Appendix 16a. The district court further completely rejected as a proximate cause the fatigue failure in the fin attachment fittings. Appendix 16a. In deciding the disputed factual issues as to causation, the courts below have usurped the function of the jury as the trier of fact and have denied petitioner its right to trial by jury.

Further, even if the record did not evidence triable issues of fact, the substantial uncompleted discovery with respect to the very liability issues before the district court made summary judgment clearly inappropriate. The district court was fully aware of the pending discovery proceedings at the time of the hearing on the motion for summary judgment; however, the court proceeded to grant summary judgment dismissing the complaint. The district court thus effectively denied petitioner access to the evidence which would have served to establish triable issues of fact. This evidence was not only within the peculiar knowledge and possession of Boeing, but was also within the knowledge and possession of non-party witnesses.

It is manifestly improper for a court to grant summary judgment when the facts have not been fully developed and, thus the granting of summary judgment in favor of Boeing where discovery as to the issues involved was outstanding, was in direct contravention of the summary judgment rule.

The Court of Appeals did not even address this issue, instead holding that the technical failure to file an affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure barred petitioner from arguing that it was error for the district court to grant summary judgment on an incomplete record. The Court of Appeals further stated that the petitioner "can hardly argue at this late date that the district court abused its discretion in ruling on the summary judgment motion." Appendix 13a. Summary judgment is *not* a discretionary remedy. The district court did not possess any discretion to grant summary judgment dismissing the complaint where the standards set forth Rule 56 and enunciated by the Court were not met. This is true regardless of whether an affidavit pursuant to Rule 56(f) has been filed.

Considering the severity of the summary judgment remedy in cutting off the litigant's right to trial and the Court's stringent guidelines in ruling on summary judgment motions, it is impossible to believe that the mere technical failure to file an affidavit pursuant to Rule 56(f) permits a court to grant summary judgment dismissing a complaint where further discovery is clearly needed and is ongoing at the time the summary judgment motion is decided.

Boeing contends in its Brief at p. 3 that the issue with respect to the uncompleted discovery proceedings was raised for the first time in petitioner's motion for reconsideration. This is completely inaccurate! The district court was fully aware at the time of oral argument on the summary judgment motions that there was significant outstanding discovery. Prior to the oral argument, petitioner had even asked for an adjournment of the trial date for one year so that discovery could be completed.

Boeing's Brief contains numerous other such inaccuracies. For example, it asserts that there is no support in the record for petitioner's contention that the district court based its conclusions upon the erroneous assumption that the parties agreed that there were no material facts in dispute. A reading of the district court's Order on Summary Judgment Motions clearly demonstrates otherwise.

> This matter comes before the Court on plaintiff's motion for partial summary judgment on liability and defendant's motion for summary judgment. *The parties agree that there are no material facts in dispute* . . .

Appendix 16a.

Further, Boeing attempts to create the impression that this particular litigation has been ongoing since 1966 in support of its position that petitioner had had sufficient opportunity for discovery. This is entirely inaccurate! Pursuant to agreement between British Airways and Boeing, this litigation was not commenced until all passenger and crew claims arising out of the accident had been disposed of. Furthermore, it was agreed that discovery proceedings as between British Airways and Boeing in the passenger and crew cases would be limited to that necessary for each one's own defense. When the last passenger or crew claim was disposed of in November, 1971, extensive settlement negotiations of this case were entered into which proved unsuccessful. Thus, this litigation was not commenced until 1973. The action was transferred to the Western District of Washington in 1974 upon the motion of Boeing. In September, 1974, discovery was finally able to be commenced.

Discovery was delayed several times *by Boeing* so that it might further consider settlement of the case. In addition, extensions of time to answer interrogatories and postponements of depositions were requested by Boeing and were granted!

Even if Boeing's assertion that British Airways had ten years between the crash and the hearing on the summary judgment motions in which to conduct discovery was correct, it would not alter the fact that summary judgment was inappropriate where discovery as to the pertinent issues was incomplete. The Court of Appeals, however, rejected petitioner's argument that summary judgment should not have been granted in view of the uncompleted discovery proceedings, stating that "after twelve years of investigation and litigation" British Airways has not been able to come up with sufficient evidence as to a triable

issue of fact. Appendix 12a. Clearly, the Court of Appeals viewpoint was colored by the false impression created by Boeing with respect to this litigation.

In summary, the granting of summary judgment by the district court and affirmance by the Court of Appeals are clear misapplications of the summary judgment rule. British Airways has been denied its right to trial. It has been prevented from even completing the very discovery proceedings which would have developed the evidence supporting its position that there are triable issues of fact. Certiorari should be granted in order to correct this misapplication of the summary judgment rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, as prayed herein.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have, this 23rd day of March, 1979, served the foregoing petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit upon respondent by depositing same in a United States mailbox at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid to:

Perkins, Coie, Stone, Olsen & Williams
1900 Washington Building
Seattle, Washington 98101
Counsel for Respondent

March 23, 1979

/s/ GEORGE N. TOMPKINS, JR.
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